

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
IN SEATTLE

UNITED STATES OF AMERICA, et al.,)
)
Plaintiffs,) No. C70-9213
) Subproceeding 05-4
v.)
)
STATE OF WASHINGTON, et al.,)
)
Defendants.)
)

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE RICARDO S. MARTINEZ

April 24, 2013

APPEARANCES:

Daniel A. Raas
RAAS JOHNSEN & STUEN PS
P.O. Box 5746
Bellingham, WA 98227

Mason D. Morisset
Rob Roy Smith
MORISSET SCHLOSSER AYER & JOZWIAK
801 Second Avenue
11115 Norton Building
Seattle, WA 98104

**Lauren Rasmussen
1904 Third Avenue
Securities Building, Suite 1030
Seattle, WA 98227**

Michelle Hansen
OFFICE OF TRIBAL ATTORNEY
SUQUAMISH TRIBE

James Jannetta
OFFICE OF TRIBAL ATTORNEY
SWINOMISH TRIBE

1 THE CLERK: This is the oral argument on the
2 pending motions for summary judgment, Docket Numbers 193,
3 195 and 199, in the case of the United States, et al.
4 versus the State of Washington, et al., cause number
5 C70-9213, sub-proceeding 05-4.

6 Will counsel please rise and make their appearances
7 for the record?

8 MS. HANSEN: Good morning, your Honor. Michelle
9 Hansen for the Suquamish Tribe.

10 THE COURT: Ms. Hansen, good morning.

11 MR. MORISSET: Good morning, your Honor. Mason
12 Morisset for the Tulalip. With me at counsel table is Tim
13 Brewer, the on-reservation attorney.

14 MR. JANETTA: Good morning, your Honor. Jim
15 Jannetta for the Swinomish Indian Tribal Community.

16 THE COURT: Mr. Jannetta, thank you.

17 MS. RASMUSSEN: Good morning. My name is Lauren
18 Rasmussen for the Port Gamble S'Klallam and Jamestown
19 S'Klallam Tribes.

20 THE COURT: Ms. Rasmussen.

21 MR. RAAS: Good morning, your Honor. Dan Raas for
22 the Lummi Nation. I am here sitting at the end of counsel
23 table just to take advantage of the writing surface.

24 THE COURT: You are more than welcome to sit
25 there, Mr. Raas. Thank you. I know we have other

1 attorneys present in the courtroom. And I realize that
2 these are the groups that are going to be arguing the
3 case, but just let me have all of the attorneys that are
4 here at least stand up and be recognized for our record.

5 MR. TOBIN: Good morning, your Honor. Bill Tobin
6 from the Nisqually Indian Tribe.

7 MR. LYON: Good morning, your Honor. Levin Lyon
8 for the Squaxin Island Tribe.

9 MR. SLONIM: Good morning, your Honor. Mark
10 Slonim for the Makah Tribe.

11 MS. HALEY: Good morning, your Honor. Emily
12 Hutchinson-Haley for the Swinomish Tribe.

13 MR. REICH: Good morning, your Honor. Richard
14 Reich for the Muckleshoot Tribe.

15 MS. KING: Good morning, your Honor. Lauren King
16 for the Quileute Tribe.

17 MR. NIELSEN: Good morning, your Honor. Eric
18 Nielsen for the Quinault Tribe.

19 MR. SMITH: Good morning, your Honor. Rob Roy
20 Smith for the Stillaguamish Tribe.

21 MR. MANNAKEE: Good morning, your Honor. Scott
22 Mannakee for the Stillaguamish Tribe as well.

23 MR. BELLIS: Good morning, your Honor. Rick
24 Bellis for the Suquamish Tribe.

25 MS. ALLEN: Good morning, your Honor. My name is

1 Melody Allen, Suquamish Tribe.

2 MS. NEIL: Mary Neil for the Lummi Nation as well.

3 THE COURT: Thank you all. Welcome to the oral
4 argument of sub-proceeding 05-04, or the meeting of Puget
5 Sound Part II. I have read the materials that have been
6 submitted.

7 Mr. Morisset, I suggest we do the following: Why
8 don't we have you do the argument, have Mr. Jannetta join
9 in afterwards for the Swinomish perspective on -- more of
10 a partial motion for summary judgment, and then we will
11 have Ms. Hansen actually reply.

12 Twenty minutes a side? That sounds good?

13 MR. MORISSET: Yes, your Honor. I would like to
14 be sure to save some rebuttal to reply to Ms. Hansen, and
15 she may want to do the same.

16 THE COURT: Perfectly fine. Mr. Morisset, are you
17 ready?

18 MR. MORISSET: We are ready, your Honor.

19 May it please the court, Mason Morisset for the
20 Tulalip Tribes. I thought this was the meeting of Puget
21 Sound No. 47. Kind of like the Super Bowl, it keeps
22 getting larger.

23 As your Honor has indicated, we are here again trying
24 to understand in greater detail the meaning of some words
25 that were used by the court some time ago. This

1 particular controversy involves the findings of the court
2 in 1975 as to the usual and accustomed fishing places of
3 the Suquamish.

4 As reported at 459 F. Supp. 1020 at Page 10 to 49,
5 those include, quote, "The marine waters of Puget Sound
6 from the northern tip of Vashon Island to the Fraser
7 River, including Haro and Rosario Straits, the streams
8 draining into the western side of this portion of Puget
9 Sound, and also Hood Canal."

10 And I have put on the projector here a map that is
11 Exhibit A, I think, to our motion for summary judgment,
12 primarily to assist us in knowing what we are talking
13 about when we are talking about the areas that I have
14 marked in yellow, basically, Possession Sound there,
15 Port Susan there, Port Gardner, the small area there,
16 Holmes Harbor, running southerly off Saratoga Passage,
17 which is indicated there, and also Mutiny Bay, Useless
18 Bay and -- There is one other. Anyway, those are the
19 three areas. Cultus Bay. These are areas that are
20 essentially in dispute in this sub-proceeding.

21 All of these areas are within the Tulalip usual and
22 accustomed grounds and stations as finally determined by
23 the court after numerous negotiations, agreements, court
24 proceedings and finally a full trial on the matter by
25 Judge Craig in 1985, as reported at 626 F. Supp. 1405,

1 Pages 15 through 27.

2 Now, in our motion for summary judgment, pursuant to
3 the court's scheduling orders, we argue that this case
4 follows previous cases, which I know your Honor is all too
5 familiar with, arguments over where is the Strait of
6 Juan de Fuca, where are these other areas, and what is the
7 meaning of these phrases.

8 And, of course, we have 05-3 that you spent
9 considerable time on, went up to the circuit, which gives
10 us some guidance as to the need to review these matters in
11 light of the findings of the court and the rules that the
12 circuit has given us, and the district court has followed
13 through these many, many years.

14 In 1975 Judge Boldt certainly had before him Exhibit
15 U.S.A. 73, which is also attached as Exhibit C to my
16 motion for summary judgment, in which Dr. Barbara Lane
17 explained that, quote, "The Suquamish held the west side
18 of Puget Sound, from near the mouth of Hood Canal, south
19 to Vashon Island."

20 The additional material that she placed in that
21 report, and we have repeated it in the record for this
22 case, show Suquamish fishing places, as recorded by
23 Waterman, solely on the west side of Puget Sound, and
24 place names solely on the west side of Puget Sound.

25 Now, I have marked on this map, which is

1 Document 200-3 in this case, but, as I say, originally
2 Exhibit U.S.A. 73, Bainbridge Island, to give us some
3 direction of where we are. While it is too small to read
4 on the screen, there are numbers throughout the east side
5 and west side of Bainbridge, and then back into these
6 small bays and areas, and going on down to Vashon Island.
7 This is accompanied with a listing of what all these
8 numbers means, which is the Waterman fishing places.

9 The second map, chart technically, shows the existence
10 of place names, again based on -- I'm sorry. This is
11 fishing. The symbol shows on the map, at the upper right
12 up here, what kind of fish were taken where. And, again,
13 the places are essentially around Bainbridge, the nearby
14 waters and so on.

15 So at the time, Judge Boldt certainly didn't have
16 anything before him, in terms of the location of Suquamish
17 fishing areas, or Suquamish villages, or Suquamish place
18 names that would place them on the east side of the marine
19 waters.

20 Waterman was a combination ethnographer and
21 geographer. His manuscript was published in 1864, which
22 means he did the work not long after the treaties, and we
23 therefore assume it was pretty accurate as to treaty
24 times. So from that 1864 report on which Dr. Lane and
25 others have relied, there is certainly no indication of

1 Suquamish fishing beyond that area.

2 Further, we note that Judge Boldt knew how to use
3 geographic descriptors, to include other waters when that
4 was his intent. He did so in great detail in the Tulalip
5 determination, which is not finalized, which originally
6 was done in 1975, and then was finalized by Judge Craig in
7 1985, where specific areas -- or names of specific bodies
8 of water, specific place names for the areas where people
9 fished.

10 The Tulalips had numerous place names in these areas
11 that we are talking about. If we have an hour or two I
12 will get it straight which way I have to turn this, your
13 Honor. We have numerous place names for these areas
14 marked in yellow. There are 127 place names around
15 Whidbey Island that belong permanently to the Snohomish,
16 the predecessor to Tulalip. There were a large number of
17 fishing places also around the same area. Many of them
18 referred to such names as Sabidaba (phonetic), as it was
19 in Waterman's list, and another place named The Place For
20 Using a Dip Net, and so on. 127 place names, including
21 the port village sites and settlements in the area.

22 The indication that this was clearly Snohomish home
23 territory also leads to the conclusion that it is not
24 likely that a tribe from the other side of the Sound and
25 the waters came over freely to attempt to fish in front of

1 villages, fishing sites and so on.

2 This court noted that Suquamish claims they maintained
3 close relations with some people in the area who had
4 fishing sites on Whidbey and Camano would be speculative
5 for you to conclude this meant that the Suquamish
6 necessarily camped and fished there as well. It is in the
7 order of January 3, 2007, Docket Number 18724.

8 The Ninth Circuit, in looking at various claims that
9 the Suquamish have made over the years, noted in its 1990
10 decision that Suquamish hold usual and accustomed places
11 at several areas on the west side of Puget Sound. They
12 have that -- As to a claim by Suquamish that they fished
13 on the east side, they have at Page 1020 -- that decision,
14 590 F.3d 1020, at the time of the treaty, pointed out they
15 did not fish in those areas.

16 So we have pretty clear discussion of the fact that
17 there is no indicators that Suquamish ever fished in these
18 areas.

19 Judge Boldt had these facts before him, and I think
20 very similar to what this court and the circuit held in
21 05-3, the absence of naming these specific areas, evince
22 an intent not to include them. He certainly knew how to
23 name specific place names when he needed to. He knew how
24 to anchor fishing rights with reference to certain place
25 names, and he did not do so in this case.

1
2 THE COURT: Mr. Morisset, let me ask you a
3 question while you have this exhibit up on the ELMO there.
4 Do you see where Catch Area 9 there, you have Useless Bay
5 and Mutiny Bay highlighted. Catch Area 9, is that at
6 issue in any way, or is it just a little highlighted area
7 that you've got?

8 MR. MORISSET: The amended -- You recall we went
9 up to the circuit a couple of times. The amended request
10 for determination states that there is no evidence of
11 fishing on the east side of Admiralty Inlet, which is this
12 whole area. And then I named including those specific
13 bays, which I think is probably the only place at this
14 point that there would be active fishing, if any.

15 There is an indeterminant, obviously, middle ground
16 there somewhere, which we would think would be the
17 demarcation point between the east side and the west side.
18 Honestly, I don't know where that is.

19 Once again, we get to lay the muddy bag on the court's
20 lap to try to figure out whether there should be a
21 boundary there.

22 But the remarks as to these specific bays is the same
23 as it is for all of the other areas, that there was no
24 mention of those areas as being a fishing area, but there
25 were for Tulalip. They were specifically called out as

1 being Tulalip fishing areas.

2 THE COURT: You only have a few minutes left if
3 you want to save some time for rebuttal.

4 MR. MORISSET: I was going to say, I am going to
5 stand down.

6 THE COURT: Let me ask you a question before you
7 step down. Part of your motion is to dismiss the
8 counterclaim here for failure to state a claim. It
9 involves the violation of the prior agreement between the
10 three tribes. You don't believe that your request at this
11 point in time violates that agreement in any way, shape or
12 form?

13 MR. MORISSET: No. I was going to save that
14 argument, but I will jump right into it. I don't see how
15 filing a case to clarify Judge Boldt's intent as to these
16 northern areas is affected in any way by that agreement,
17 which dealt with fishing in Central Puget Sound only, did
18 not deal with Suquamish fishing at all, other than to try
19 to work with and was worked out an allocation of the Chum
20 runs to southern Puget Sound. There had to be an
21 agreement about how many of those to intercept and
22 harvest. But I see nothing in that agreement or the
23 court's order approving it that in any way indicates that
24 Tulalips couldn't challenge Suquamish if they chose to
25 step out and try to fish somewhere else, which is what we

1 think they are doing.

2 THE COURT: Thank you, counsel.

3 MR. MORISSET: Thank you, your Honor.

4 THE COURT: Mr. Jannetta.

5 MR. JANETTA: Thank you, your Honor. I stand
6 before you today, just as I did about seven years ago in
7 05-3, arguing about Suquamish U&A, and it seems like the
8 same waters.

9 Swinomish has filed a motion for partial summary
10 judgment to champion the decision that we in Upper Skagit
11 won in 05-3, and raise the banner of finality in this
12 case.

13 Now, I have to say that raising finality issues in a
14 case that is in its 50th year and spans two centuries is a
15 bit of a daunting task. But I think in fact finality
16 issues are more important in a case like this that is
17 ongoing and evolving, because decided matters should be
18 put behind and we should be dealing with new issues.

19 And when I saw that apparently the bodies of water,
20 Penn Cove and Saratoga Passage, are included in this case,
21 and that Holmes Harbor is also included, we felt it
22 incumbent upon us to file a motion to protect the
23 preclusive effect of -- what we believe is the preclusive
24 effect of 05-3.

25 THE COURT: Mr. Jannetta, I certainly agree with

1 your arguments on finality. From my perspective, in fact,
2 one of the circuit judges advised me to put the entire
3 case aside. That is another matter.

4 MR. JANNETTA: I know that. That circuit judge I
5 believe was in the minority on the appeal in 05-3. First
6 the majority and then the minority. And he raised that
7 issue also when we argued the Samish case en banc. I have
8 heard him on that issue before. And I urge you not to do
9 that.

10 I should go into 05-3, I think in some detail, because
11 it was decided a while ago, and it does cast a long shadow
12 on these proceedings today. In 05-3, it involved a
13 challenge to Suquamish U&As in Skagit Bay and Saratoga
14 Passage, or Shellfish Areas 24(a) and 25(c), these waters
15 that are east of Whidbey Island.

16 As the Tulalip carefully laid out in its motion, 05-3,
17 like 05-4, arose from a sudden Suquamish incursion into
18 waters that they had not previously fished. The differing
19 procedural histories of 05-3 and 05-4, which were filed
20 very close together in time, led to 05-3 being decided
21 well before 05-4 got to this stage. Your decision in 05-3
22 was in early 2007.

23 In 05-3, this court examined the record before Judge
24 Boldt at the time he made the Suquamish U&A determination
25 in 1975. The court concluded that Judge Boldt did not

1 intend to include Skagit Bay and Saratoga Passage in
2 Suquamish U&As. This court's decision was based on the
3 finding that there was no evidence before Judge Boldt that
4 Suquamish fished or even traveled in the waters on the
5 east side of Whidbey Island.

6 Here is how the court framed the issue in its order on
7 motions for summary judgment in early 2007: "In this
8 inquiry the burden is on Upper Skagit and Swinomish to
9 demonstrate that there was no evidence before Judge Boldt
10 that the Suquamish fished on the east side of Whidbey
11 Island, or traveled through there on their way up to the
12 San Juans and the Fraser River area."

13 And this is what the court concluded on the issue a
14 few pages later in that same order, Page 12, beginning at
15 Line 15: "This absence of evidence regarding Suquamish
16 fishing or travel through to Saratoga Passage and Skagit
17 Bay leads the court to conclude that the Upper Skagit and
18 Swinomish have met their burden of demonstrating that
19 Judge Boldt did not intend to include these areas in the
20 Suquamish U&A."

21 Now, in 05-3, as well as in this case, the universe of
22 evidence is the same in the two cases. The evidence
23 before Judge Boldt specifically regarding Suquamish U&As
24 consisted of the reported testimony of Dr. Barbara Lane.

25 Of particular importance to that testimony, and also

1 importance to this case, was the map that Dr. Lane used to
2 demonstrate the Suquamish travel route north. And this is
3 the infamous map, which was actually attached to a
4 Suquamish herring regulation, and was used during the
5 testimony of Dr. Lane when the state raised questions
6 about the travel area north. Dr. Lane testified that that
7 travel area north extended from their home waters north
8 through Areas 1 and 2 to the Fraser River. As you can
9 see, all of the waters inside of Whidbey Island, including
10 Skagit Bay and Saratoga Passage, are in Area 4.

11 And the map was important for two reasons in the case.
12 The first was, as I just said, Dr. Lane laid out the
13 travel routes, but the second reason was Judge Boldt made
14 an oral decision on Suquamish U&A from the bench at the
15 conclusion of the hearing. And Judge Boldt himself
16 referred to those areas, 1 and 2, as the travel area north
17 that was included in Suquamish U&A.

18 And, by the way, Swinomish U&A, too, there was a
19 me-too for Swinomish right after that.

20 So our U&As in that area, as well as Suquamish's, stem
21 from that map -- or partially from that map.

22 Now, when the case went to the Ninth Circuit, the
23 Ninth Circuit essentially affirmed this court in all
24 particulars in its decisions. And that's Upper Skagit
25 Indian Tribe versus Washington, 590 F.3d 1020, which was

1 decided in 2010.

2 In particular, with regard to this case, the Ninth
3 Circuit said on Page 1025, "There is no evidence in the
4 record before Judge Boldt that the Suquamish fished or
5 traveled in the waters east of Whidbey Island,
6 particularly in Saratoga Passage or Skagit Bay." The
7 Ninth Circuit also relied on this map, both with regard to
8 Dr. Lane's testimony and with regard to Judge Boldt's
9 ruling from the bench.

10 So that brings us back to this case, 05-4. There
11 should be no question but that Penn Cove and Saratoga
12 Passage were included in the claim area in 05-3. And the
13 claim preclusion applies to prevent re-litigation of that
14 in this case.

15 THE COURT: Tell me why I should include Holmes
16 Harbor in that.

17 MR. JANETTA: The Holmes Harbor situation is
18 different. Issue preclusion precludes that in Holmes
19 Harbor. Holmes Harbor is a separate shellfish management
20 area, 24(d).

21 It wasn't included in 05-3, because at the time,
22 Suquamish wasn't fishing there, and so there was no case
23 or controversy, and no basis for the court's jurisdiction
24 at that time. In fact, Suquamish didn't begin fishing in
25 Holmes Harbor until after your decision in 05-3.

1 So claim preclusion doesn't apply, but issue
2 preclusion does, because in this case, where there is a
3 finding in 05-3 that Suquamish never traveled or fished in
4 Saratoga Passage -- If you look at a map -- This is a
5 map of the County of Island that includes -- is better
6 than some of the other maps that we have used illustrating
7 this. There is no way to get to Holmes Harbor without
8 traveling through Saratoga Passage. So if you made a
9 finding that the Suquamish didn't travel in Saratoga
10 Passage, that necessarily determines whether Suquamish
11 traveled in Holmes Harbor, and therefore whether Suquamish
12 has U&A there, even though it wasn't technically part of
13 the case.

14 The two cases are very similar. I mean, this is not a
15 case where you've got a decision in some case involving
16 different issues and facts, and you have to figure --
17 This case involves exactly the same law and facts. The
18 universe of facts -- it is more like a star cluster maybe,
19 because it is only Dr. Lane's report, essentially, and
20 testimony, is the same in both cases, and the inquiries
21 are the same in both cases.

22 If you are looking in this case for -- if you are
23 looking in 05-4 -- Let's start with 05-3. If you are
24 looking in 05-3 for evidence that the Suquamish did travel
25 in Saratoga Passage, you would look for evidence in that

1 record of whether they were in Holmes Harbor, because if
2 they were in Holmes Harbor, they would have been in
3 Saratoga Passage as well. They could not have been in
4 Holmes Harbor without traveling through Saratoga Passage.
5 So the evidence of presence in Saratoga Passage is just as
6 relevant to 05-3 as it is to 05-4, and there was no such
7 evidence, there was no such evidence presented.

8 Contrarily, once you have decided that there was no
9 Suquamish presence in fishing or travel in Saratoga
10 Passage, you have by that fact alone excluded them from
11 traveling in Holmes Harbor, just because of the
12 impossibility of going anywhere, the north or the south,
13 without going through Saratoga Passage.

14 So that is a matter that was already decided in 05-3,
15 it was litigated with Suquamish participation, the record
16 was combed and evidence was educed regarding the lack of
17 evidence.

18 Another point I guess that should be made is, of
19 course, if you look at the map of Areas 1 and 2, which
20 denote the travel area, of course, Holmes Harbor is as
21 much outside the travel area as Skagit Bay and Saratoga
22 Passage. Holmes Harbor is just a small appendage to
23 Saratoga Passage. It was an accident of the history of
24 the Suquamish fishing pattern that it was not part of the
25 case at the time.

1 Because there was no evidence in the record before
2 Judge Boldt, based on 05-3, that Suquamish traveled in
3 Saratoga Passage, and because you can't get to Saratoga
4 Passage by boat -- to Holmes Harbor by boat except through
5 Saratoga Passage, the finding in 05-3 compels the
6 conclusion that the Suquamish does not have U&A in Holmes
7 Harbor.

8 Your Honor, we believe that the Swinomish is entitled
9 to partial summary judgment, that the Suquamish has no U&A
10 in Penn Cove, Saratoga Passage and Holmes Harbor because
11 of the preclusive effect of the decision in 05-3, claim
12 preclusion in the case of Penn Cove and Saratoga Passage,
13 issue preclusion in the case of Holmes Harbor.

14 THE COURT: Thank you very much, counsel.

15 Ms. Rasmussen.

16 MS. RASMUSSEN: My client would like to make a
17 statement, but we would like to ask if we could wait until
18 the end, since nobody has raised the issue we would like
19 make a statement on. Or, if you would like, we could make
20 the statement now?

21 THE COURT: Let me have you make a statement now,
22 and that way Ms. Hansen may be able to respond to it if
23 she feels it is necessary.

24 MS. RASMUSSEN: May it please the court. I am
25 here to represent the Port Gamble S'Klallam and Jamestown

1 S'Klallam Tribes. We filed an answer in this case, and
2 also filed a response to the motion for summary judgment.
3 We are here on three discreet issues. The first and most
4 important is the Suquamish in this case filed an
5 affirmative defense, found on Page 15 of their answer, in
6 Docket Number 139, that they should be -- if they lose
7 this particular motion, they should be allowed to, under
8 Paragraph 25(a)(6), affirmatively claim these areas in the
9 sub-proceeding. And we believe that is not a properly
10 pled request for determination, and it should be done as a
11 cross-request for determination.

12 As laid out in Paragraph 25, you said -- this court
13 said that one may assert a counter-request for
14 determination in the sub-proceeding. We believe that in
15 (a)(6) -- the (a)(6) request should have been a
16 counter-request for determination, as was done by the
17 Lummi in sub-proceeding 89-2. And that's the proper
18 procedure. As such, we would ask this court to not allow
19 this to be determined, at least without filing an amended
20 cross -- amended answer and cross-request for
21 determination.

22 Number two, the Suquamish have asserted in this
23 sub-proceeding that at this juncture, and also in the
24 past, that laches should be used against Tulalip.

25 We do not weigh in on the merits of that particular

1 request, but to say that this court has held, by Judge
2 Coyle in particular, that laches is not to be used in this
3 case to defeat treaty rights. And it has been applied to
4 tribe versus tribe cases, so it is not just tribe versus
5 the state or tribe versus an outside party.

6 Judge Coyle ruled very clearly, quote, "Allowing Lummi
7 or any other tribe to assert such claims or defenses in
8 the sub-proceedings of this type," which was a U&A case,
9 "would, as a practical matter, encourage disregard for
10 this court's prior decisions." That is found at 459 F.
11 Supp. 1068 and 1069.

12 So we would just ask this court to be cognizant of the
13 law of the case. And that particular matter has been
14 decided, that for whatever defenses they may raise, laches
15 cannot be used, even in a tribe versus tribe case, and
16 therefore it shouldn't be used here.

17 The last is just a question that we were concerned
18 about, raised in Swinomish's brief, about whether this is
19 the law of the case, or whether we have a final decision
20 on the merits with respect to sub-proceeding 05-3.

21 We are concerned, of course, because we have an issue
22 in sub-proceeding 11-2 with respect to whether -- when
23 something is adjudicated, and it has been appealed to the
24 Ninth Circuit, do we have a final determination on the
25 merits, or is it the law of the case which can constantly

1 be challenged?

2 And we would like this court also to be very clear on
3 how that is determined so that we do have finality in
4 these sub-proceedings, that once something has been
5 brought up to the Ninth Circuit and affirmed, that that is
6 actually decided. And that just because of this procedure
7 that the court has recently expanded on, that you have to
8 file a request for determination every time you have any
9 issue, including a contempt proceeding, that that can
10 create this second right to appeal something, because it
11 goes up again on review. There should be some finality
12 that is clear about things that have already been
13 reviewed, and it is not just a constant re-bite at the
14 apple. Swinomish refer to it as kicking the cat. I refer
15 to it as re-biting the apple.

16 To conclude, we are here for those three particular
17 purposes. We don't weigh in on the merits, but we would
18 weigh in if this Paragraph 25(a) 96), cross-requests for
19 determination, were adjudicated. We would definitely want
20 the opportunity to weigh in fully on that, and would
21 request that be done in the proper process. Thank you.

22 THE COURT: Thank you, Ms. Rasmussen. I also
23 understand you want to be heard on a completely separate
24 matter at the end. We will do that after.

25 Ms. Hansen.

1 MS. HANSEN: Good morning, your Honor. Michelle
2 Hansen for the Suquamish Tribe.

3 Before I begin, I do have a question. Suquamish filed
4 its own motion for summary judgment with three bases. Did
5 you want this to be part of the 20 minutes, as well as
6 responding to what they were doing?

7 THE COURT: Why don't you take a minute? I have
8 read everything. Take a minute to respond to them, and
9 then you can argue as to your motion as well.

10 MS. HANSEN: Appreciate that. Thank you.

11 I think what is important, and the court addressed
12 this in its first motion for dismissal, and that's the
13 question of judicial estoppel. I think it is very
14 important here.

15 Especially -- I am going to start with the Swinomish
16 motion for partial summary judgment. It was clear in
17 sub-proceeding 05-3 that the court limited its discussion
18 of the treaty rights to Saratoga Passage and to Skagit
19 Bay. And, in fact, on several occasions there were
20 parties, including Suquamish, who asked for it to be
21 expanded. And the court said, no, I am just going to deal
22 with those two issues.

23 In light of that, I think that it would be imprudent
24 to now allow Swinomish, or any other tribe, to come in and
25 say, well, Holmes Harbor, for instance, wasn't ripe,

1 because Suquamish wasn't fishing there, Penn Cove wasn't
2 ripe because Suquamish wasn't fishing there, and so we are
3 not going to deal with that, or ask to have it dealt with,
4 and then now come in in this sub-proceeding and say there
5 is issue preclusion.

6 My understanding from the 05-3 proceeding was that you
7 were going to take areas at a time as they came up instead
8 of trying to deal with them all at one time.

9 So in light of that, I would ask the court to deny
10 that motion for summary judgment -- partial summary
11 judgment on Holmes Harbor, Penn Cove -- I have separate
12 issues related to Saratoga Passage, as far as those.

13 THE COURT: You do agree there is no way to get
14 into Holmes Harbor other than through Saratoga Passage?

15 MS. HANSEN: I don't mean to be flippant, but in
16 treaty times people did portage. And we have in fact done
17 historical research, and we have the ability today, if we
18 went to trial, to prove that Suquamish pre-treaty, and at
19 treaty, was at Holmes Harbor, and had traveled there from
20 the area that is called Edie's Prairie where they had a
21 settlement. In fact, it is possible to go there.

22 Of course, generally, if you are going to travel, by
23 canoe or even today by any motor -- marine vehicle you are
24 going to pass through Saratoga Passage.

25 But as the court noted, even in the recent Lummi case,

1 even though they don't have fishing rights in a certain
2 area, they certainly can pass through it to get from one
3 treaty area to another treaty area.

4 The fact of the matter is, if we went to trial,
5 Suquamish would in fact show and prove that they were in
6 Holmes Harbor. So I wouldn't rule it out for that reason.

7 In answer to some of Tulalip's points in its motion
8 for summary judgment, I think the most important point is
9 the fact that Suquamish and Tulalip and Muckleshoot
10 entered into a settlement agreement. They did not go to
11 trial. And Judge Craig made it clear in his ruling that,
12 as to his ruling on U&A for Tulalip, it only applied
13 against the Lummi, it did not apply against anybody else,
14 any other tribe who had settled with Tulalip prior to.

15 So when you get --

16 THE COURT: Ms. Hansen, I have that right here in
17 my hand. If you have a copy of it, show me in what
18 portion of it the Tulalip are in violation by asking the
19 court to make the rulings that they have asked in this
20 particular summary judgment motion.

21 MS. HANSEN: The thing about the stipulation
22 between the Muckleshoot, Tulalip and Suquamish was that it
23 was so that the parties would not go to trial, and that
24 they would in fact resolve these overlapping U&A claims.

25 In fact, during the weeks before it was to go to

1 trial, Allen Stay, who is representing Suquamish, was in
2 heavy negotiations and wrote letters. Those letters were
3 presented to the court, submitted late, that made it clear
4 that, as far as Suquamish was concerned, they didn't think
5 the Tulalip could prove all of these points they were
6 making, and said so. And yet, they agreed, like people
7 do, like tribes do, to enter into a settlement agreement
8 in order to do several things. One, to avoid the cost of
9 trial. And also, in order so there would not be hard
10 feelings, and that they could try to figure out how to
11 move ahead --

12 THE COURT: Ms. Hansen, I am a huge fan of that.
13 I have been trying to get everybody in this case to do
14 that as often as possible. But I need you to show me --
15 You are arguing in your countermotion here that they
16 violated that agreement. I would love to find that they
17 violated the agreement. It would make it a lot easier for
18 me. Show me where.

19 MS. HANSEN: On Page 2 of the agreement it really
20 is the fundamental point, and it is at Line 6 through
21 Line 10, and it says, "This settlement is intended to
22 protect the existing fisheries of the Muckleshoot and
23 Suquamish Tribes in Central Puget Sound, while at the same
24 time recognizing the right of all tribes taking a portion
25 of fish passing through each other's usual and accustomed

1 fishing places.

2 It is the fundamental principle, and the reason why
3 the Suquamish entered into this agreement, is the Tulalip
4 said we will not contest your U&A. We will not argue that
5 it is insufficient.

6 In fact, in one of the other letters that was
7 submitted late, it was a letter from Chairman Stan Jones
8 on May 5th, 1983, he says specifically we do not contest
9 the sufficiency of evidence of any other tribe, we just
10 want to be treated fairly in this sub-proceeding, which is
11 the 1983 sub-proceeding.

12 THE COURT: Hang on a second. I have read this
13 several times now. I really am trying to --

14 MS. HANSEN: You are trying to find where that is?

15 THE COURT: I have it. I actually had that same
16 passage marked. That's the introduction portion. And
17 then you slide into Page 3, Section 2, at the very top,
18 which talks about very specifically the usual and
19 accustomed fishing places. Any violation anywhere in that
20 area?

21 MS. HANSEN: The Suquamish Tribe right now has
22 ongoing a sub-proceeding that started in 2008. 2008-01 is
23 what it is called. And that is where the Suquamish Tribe
24 is actually bringing its action for breaches to this
25 agreement. And there are breaches -- I don't know if the

1 court recalls, we were working on the Fall Chum Fishery,
2 there were disputes about that, and we were actually able
3 to mediate that and come to some resolution. But we still
4 have crab issues, we have shrimp issues, a number of
5 issues that are ongoing, and that we, the two governments,
6 are still talking about.

7 In terms of specific violations of the agreement, that
8 is being handled in a separate sub-proceeding, 08-01.

9 This counterclaim has to do with the general concept
10 of the Suquamish Tribe having entered into this settlement
11 on several promises. There are actually three promises.
12 The first one was, we will -- we do not -- their
13 representation that we do not contest the sufficiency of
14 evidence for any tribe, and that means Suquamish's U&A.
15 Second, that they will protect Suquamish's current
16 fisheries as they exist. And third, I don't know which
17 page it is on, but they agreed -- Tulalip agreed to be
18 bound to fish under the regulations that are put forth by
19 Muckleshoot and Suquamish together in Central Sound.
20 Those were the three things that were the basic tenets of
21 the agreement and the settlement, the reason why Suquamish
22 didn't go to court.

23 Today, for the purposes of this counterclaim, we are
24 saying that Tulalip had violated that basic tenet that
25 they would not go after and try and reduce or do anything

1 to the Suquamish.

2 THE COURT: I guess the problem I have with that,
3 Ms. Hansen, is -- I have the agreement here in my hand.
4 And unless you can show me where the violation occurs, it
5 is difficult for me to respond to whatever may have been
6 the motivation that drove the parties together, or
7 whatever their thought process was. I've got the document
8 that was drafted by all the parties here and signed off on
9 by all of the parties. This is the controlling document.

10 MS. HANSEN: Yes. I understand. I guess I see
11 the second page as not just a recital, but that it is a
12 fundamental part of the agreement itself. And that's the
13 difference.

14 THE COURT: All right.

15 MS. HANSEN: In any case, Judge Craig made it
16 clear when he wrote his decision, as to Tulalip's U&A,
17 that it only applied against Lummi, and that everybody
18 else, in terms of where they could fish, where Tulalip
19 could fish, where Suquamish could fish, all of those, that
20 judgment and that order was not applicable and could not
21 be used in any proceeding, not even this one, by Tulalip.
22 And they are trying to do that here. And I would ask that
23 the court not allow Tulalip to do so.

24 Mr. Morisset talked about Mr. Waterman.

25 Mr. Waterman's report is unpublished, and it is

1 incomplete.

2 While it does talk about his conversations with
3 Suquamish informants about the homeland, there is nothing
4 in there, because he didn't ask the question of Suquamish
5 informants what is your place name for, say, Edmonds or
6 Mukilteo. He never asked that question. I don't think
7 you can infer from his report, or whatever Dr. Lane is
8 saying about his report, that because there is no place
9 name that Waterman came up with, that Suquamish did not
10 actually fish there, or did not have a place name there.

11 Tulalip is trying to argue that if there is no place
12 name given by Waterman, Suquamish couldn't have been
13 there, and couldn't have been fishing. And yet, the court
14 has already ruled in -- specifically in 05-3, that
15 Suquamish had traveled from Fort Madison up through
16 Admiralty Inlet.

17 If I may approach the board? This is JX-4. JX-4 was
18 used in 1975 to talk about the herring. These red marks
19 are where the herring fisheries were. This is Port
20 Madison, and this is Whidbey Island. Here is all the
21 different parts.

22 Your Honor, in 05-3 you had stated, looking at what
23 Barbara Lane had said about the travels to Fraser River,
24 that the Suquamish left Port Madison and then went up
25 through Admiralty, and then went into Haro, Rosario

1 Straits, and that way.

2 So to argue that because there are no place names from
3 Waterman here on this site, that Suquamish didn't take
4 this route, this court has already said it has, and it has
5 done so. That then gets to Admiralty Bay, Mutiny Bay,
6 Useless Bay, Cultus Bay, all of those points that are in
7 the case study -- or the case area for Tulalip, are all on
8 that west side, and so is Admiralty Inlet itself.

9 So in terms of using Waterman, I don't think it is
10 appropriate for this.

11 Tulalip argues that Suquamish didn't have any fishing
12 or never came to the east side of Whidbey Island. And I
13 want to go back to the map, if I may. What happened, in
14 fact, was that Barbara Lane did say in her report that
15 during the fall and winter, and it is documented by ^
16 George Paige, who is the Indian agent -- Because the year
17 after the treaty the Suquamish were starving because they
18 couldn't go to their regular east side fishing grounds,
19 and they fished in the fall and winter at the Duwamish
20 River and at the Snohomish River. The Ninth Circuit, and
21 this court, has said that is true.

22 So the point with this is, they had to have gotten
23 from their homeland, which is here -- As noted, this is
24 about three and a half miles. And fall and winter
25 fisheries, as Judge Boldt said, are the usual fresh water,

1 in the wintertime, when-you-are-staying-in-one-place
2 fishery. It means that this fishery was a homeland
3 fishery for the Suquamish.

4 Now, the point that is important is that Tulalip in
5 its own 1975 request for determination for this U&A had
6 Barbara Lane testify.

7 The attorney, Lewis Bell, asked her, well, where were
8 the Snohomish, the Skykomish and the Snoqualmie? And she
9 said they are on these rivers and in adjacent marine
10 areas. She used those words. And Mr. Bell said, well,
11 where is that? And he said, is that Holmes Harbor?
12 Port Susan? Saratoga Passage? Is it Possession Sound and
13 Port Gardner? Is it the west side of Whidbey Island, at
14 least halfway up? And Barbara Lane said, yes, yes, it is.
15 I agree. But I have to tell you, Judge, that -- She also
16 said she didn't have any documents to prove it. Okay?

17 My point for judicial estoppel, and I will say it
18 here, is that the Tulalip can't use that testimony and
19 say, well, the marine waters that are adjacent to the
20 Snohomish River include all of these areas for Tulalip,
21 but they don't for Suquamish. When Barbara Lane -- The
22 same expert, same location, same words, "adjacent marine
23 areas."

24 So in addition to the earlier comments that the court
25 had made back in 2005 about the use of Puget Sound, and

1 this reasonable expectation that Puget Sound would be for
2 Tulalip, include these areas, well, necessarily for
3 Suquamish, too. You can't have it go inconsistently, one
4 for one tribe and one for the other.

5 Mr. Morisset also talked about laches, and said the
6 1990 decision by the Ninth Circuit precluded Suquamish,
7 and said they were only on the west side.

8 The court has already, in its previous ruling in
9 October of 2005, said that laches applies. Not because
10 this is a treaty rights case -- And I think the court
11 agreed that laches does not apply when treaty rights are
12 involved, but that Tulalip's case regarding this east of
13 Puget Sound is really an interpretation of its Ninth
14 Circuit case, it is not a treaty rights case. The court
15 held that before, and the Suquamish asks the court to hold
16 that again.

17 It is important to note that treaty rights vested at
18 treaty time. So when opposing counsel talk about
19 Suquamish not having fished there, and I think the words
20 are "incursion into this area" in 2003, it is not an
21 incursion. Judge Boldt made it clear that the treaty
22 rights vested at treaty time, which meant that you could
23 or could not use it at any time.

24 And we have to say, for Suquamish, it has about 15
25 fishermen, and it has a very large U&A. So to expect that

1 Suquamish every year has to go through every area in order
2 to protect its right, I think is not what Judge Boldt
3 expected, and I don't think that is what the treaties
4 expected either.

5 Although Mr. Jannetta said the evidence is the same
6 between 05-3 and 05-4, I think that it is significantly
7 different. And I think the court noted that. Tulalip is
8 in a different position than these other tribes that are
9 also defendants in this case -- plaintiffs in this case.
10 The fact of the matter is that there is not only the
11 relationship of the MST, the settlement agreement, but
12 there is also the language that is the same between
13 Barbara Lane's testimony regarding Tulalip and Suquamish.

14 So the court noted before that there is a difference.
15 And I think, if you may, Suquamish asks the court to again
16 see that distinction and treat 05-4 differently.

17 The most important part, and it perhaps is a closer
18 look at what happened in April 1975 -- What happened is
19 this: That map that Mr. Jannetta showed you was attached
20 to a regulation. And if you took a look at that, the
21 writing in the regulation talked about Area 1, Area 2,
22 Area 3 and Area 4, all areas. And that was submitted by
23 Mr. Morisset on behalf of Suquamish at the time he was
24 representing them. That was the Suquamish Tribe's
25 assertion of where it had a treaty right to fish.

1 Another thing, no tribe objected to that regulation.
2 And Judge Boldt noted that. He thought -- In an exchange
3 with Mr. Salomon, who was the AG, said, essentially, what
4 is it to you? The tribes aren't complaining. They are
5 the ones that would be sure to keep somebody out if they
6 didn't qualify, because that tribe trying to get in would
7 be taking part of the share. He found that alone was
8 enough, at least sufficient, to show a *prima facie* case.

9 The other things that were important about that 1975
10 hearing is that Lummi representative Forrest Kinley
11 presented a joint Indian regulation. And he said that
12 every tribe was involved.

13 And following that, Mr. Morisset is talking to the
14 judge about what happened, and he said: Boy, since that
15 order of -- I think it was March 28th, we have been
16 meeting; the attorneys and Indians are meeting, the
17 Indians are meeting with the state, everybody is meeting
18 with everybody else, and we are really trying to do what
19 we can for you, Judge. And we just can't do it, and that
20 is why we are here today. That was April 10th.

21 In addition, I think it is important that Dr. Whitney,
22 who was the FAB, the Fish Advisory Board expert, got on
23 the stand and said we have agreed, Indians and
24 non-Indians, to have a joint fishery. And we are going to
25 have the same regulations.

1 In 05-3 the court noted that there is this June 1975
2 regulation that was put out by Suquamish and said, well,
3 that is evidence of what Suquamish thought was its U&A.
4 In fact, if you take a closer look at that, it turns out
5 that that is a revision of the regulation in order to
6 match what the state was doing by agreement of all the
7 parties. Also, on the face of that June regulation it
8 says we are doing this because we had made an agreement
9 for the state and the U.S. Fish and Wildlife to be able to
10 do biological monitoring. In order to do that, we all
11 need to be fishing at the same time in the same places.

12 And I think it is important -- I am going to look at
13 another map here. This is JX-3 --

14 THE COURT: Did you say JX-3?

15 MS. HANSEN: JX-3. Joint Exhibit 3. It goes
16 together with JX-4. They were used in 1975.

17 These areas here, this is Northern Puget Sound, and as
18 you can see, spawning areas, purse, gill net, different
19 types of fisheries. And this is Central Sound and South
20 Sound. In the testimony before Judge Boldt they are
21 talking about what the fishery is going to be. All of the
22 fishery for herring roe was going to occur here. It was a
23 five-week fishery starting in April.

24 Judge Boldt was under a timeline. I'm sure that you
25 have been in that situation yourself. The fact is,

1 Mr. Millikan testified that this was a million-dollar
2 fishery over 14 days, and the state had created a limited
3 entry fishery, which meant that 17 fishermen, non-Indian
4 fishermen, were on there for 14 days to catch a million
5 dollars' worth of fish. It was a lucrative fish, and
6 that's why there was a big fight. And the tribes were
7 trying to get into that fishery, and the state was
8 resisting. So there was a lot of talk about putting it
9 together.

10 The state didn't care about Area 3 and 4. And they
11 didn't object to it. Neither did the tribes. They were
12 objecting, and all of the testimony you saw was about
13 Areas 1 and 2, because that's where the fisheries were
14 occurring, here, and I think parts of here, that they
15 would have to go through.

16 That's why the evidence before Judge Boldt was only
17 about 1 and 2. It wasn't because the tribe was limiting
18 it to that, it was because the court already understood
19 that nobody objected. It is like a judgment on the
20 pleadings. Nobody objected to the submission, and,
21 therefore, they were only going to deal with the matters
22 that were in dispute.

23 And I think that is important to note when you say
24 there is an absence of evidence about fishing here in this
25 area that is the case area here, because, look -- If you

1 look at JX-4, there is no herring fishery here. There is
2 no reason to talk about it. And that's why they didn't.

3 So, ultimately, when you get back to the question of
4 whether or not in sub-proceeding 05-3 Judge Boldt made an
5 affirmative decision not to include Saratoga Passage or
6 Skagit Bay, the answer is no.

7 The only thing we have here is the court -- this court
8 and the Ninth Circuit saying we have to infer from the
9 fact that there is no evidence present that he didn't
10 intend to include it.

11 Well, it has got to be one of two ways. You can't
12 come in after the fact and say now we are going to have
13 issue preclusion.

14 But the fact of the matter is, the Suquamish should be
15 allowed -- If there was no evidence before Judge Boldt,
16 then under paragraph 25(a)(6), which says if I haven't
17 decided it, you can bring it before me, we should be given
18 that initial opportunity to make a presentation of
19 evidence to get an affirmative ruling on whether we were
20 there or not, and not to be foreclosed by an inference
21 just because it was not part of the dispute that was going
22 on in April of 1975.

23 There was some conversation about Holmes Harbor being
24 limited and all of that, but I think it is also important
25 to note, if you look at the map again, that these are

1 places that are safe havens. Any person who is in a canoe
2 or a kayak at treaty time, and even today, you are going
3 to go into these areas. You might camp there. You might
4 take refuge for a day. You might take refuge for a couple
5 of hours. It is important. And the court can take
6 judicial notice of the fact that the Strait of
7 Juan de Fuca has strong winds all year around. And so at
8 treaty time, and now, people use all of the waterways in
9 order to take the best and safest route. That's no
10 different in 1855 than it is today.

11 All in all, your Honor, I think that it is important
12 that you look at what was happening in April of 1975, and
13 find -- if you read the words Judge Boldt says: I don't
14 see the Indians objecting at all. And so, state, what is
15 it to you? Why are you objecting? Mr. Salomon says,
16 well, it just isn't sufficient, I want to go through this.
17 Judge Boldt says, okay, we will go through the testimony.
18 That's why there is some cross-examination really of
19 Dr. Lane about what was going on in Areas 1 and 2.

20 And she was clear, it is big, Suquamish went to Fraser
21 regularly -- She didn't have a whole lot of detail about
22 it because it was just a fairly broad-based understanding
23 that she could see from the documents that she reviewed,
24 the letters that were at Fort Langley that said the
25 Suquamish were here again, "The Suquams were here." If we

1 go to trial, your Honor, we have evidence that shows that
2 they were there on a regular basis, especially in the
3 early 1800s.

4 All in all, we request that the court look at
5 Suquamish's motion for summary judgment on res judicata,
6 on laches, and on judicial estoppel, and grant Suquamish
7 its motion.

8 Also, in looking at what the Tulalips have produced,
9 in terms of their motion, and the facts as they are that
10 are not controverted because they are already in the
11 record, that Suquamish is entitled to summary judgment on
12 the grounds of the fact that they were also there.
13 Barbara Lane said they were there. The Ninth Circuit has
14 already said, as to this area that is the case area, the
15 Suquamish have already been there.

16 Thank you.

17 THE COURT: Thank you, Ms. Hansen. Mr. Morisset.

18 MR. MORISSET: May it please the court. I kind of
19 lost track of time. Are we doing okay?

20 THE COURT: It is fine. You just have a few
21 minutes left. I want to hear what your definition of
22 "marine waters adjacent to the river fisheries" means.

23 MR. MORISSET: I think the context of that is
24 important. And when that phrase was used by Dr. Lane, and
25 Mr. Bell asked her what she meant, would it include

1 specific named waters, she said yes. Beyond that, we
2 don't know what "adjacent marine waters" means unless
3 there is some context to look at it, and some indication
4 from Dr. Lane or other witnesses or informants as to what
5 it meant. In that case she named it specifically.

6 That original finding in 1975 by Judge Boldt named
7 those specific places only. That was one of the reasons
8 that it was necessary for the Tulalips to bring a request
9 for a final determination, to explore the more open marine
10 waters.

11 There is a clear pattern, your Honor, in the case of
12 all of the tribes alleging wide areas based on what we all
13 know to be the facts of treaty times, of travel to the
14 major trading areas and fish-buying areas, a lot of travel
15 to the Fraser River, for example. And there are no place
16 names or specific waters to go, it was all open. It was
17 in that famous open area known as eastern Strait of
18 Juan de Fuca. We won't go there. Don't worry. But there
19 were open marine waters.

20 But when we came to constricted waters, the court made
21 a finding in the Tulalip case that there were possibly
22 different rules about constricted waters. You didn't say
23 what they would be, except that they might be under the
24 control of the resident tribes. And we know that is a
25 different inquiry than the inquiry we are dealing with

1 here as to specificity.

2 I will quickly run through a few comments. Ms. Hansen
3 says that no one objected to Suquamish in 1975. I briefed
4 this extensively. I would just point out that, among the
5 reasons there was no objection is they did not then, and
6 did not for 30 years thereafter, attempt to fish in those
7 areas.

8 We have the uncontroverted declaration of Mr. Rawson
9 that they didn't attempt salmon fishing until about 2007,
10 and the uncontroverted testimony of Mr. McHugh that they
11 didn't attempt shell fishing until about 2003.

12 Ms. Hansen has a whole number of ideas about the
13 Waterman manuscripts, none of which are in the record. I
14 don't know where these statements come from, that his
15 materials are suspect because he didn't ask the right
16 question. That has never appeared before. Waterman's
17 manuscripts have been relied on by the courts and the
18 tribes for over 30 years.

19 We have to remember that it was Waterman's manuscripts
20 that were in front of Judge Boldt. He had the reports
21 that had them. They were not controverted at that time.
22 I don't know that they could be. He was the only person
23 to make a fairly thorough attempt to note place names and
24 fishing names -- fishing villages around the home areas of
25 the tribes. He didn't try to go out into the eastern

1 Strait of Juan de Fuca to find places. He looked around
2 the villages and home territory and noted, as I pointed
3 out, hundreds of places for Tulalip predecessors, and none
4 for Suquamish.

5 I will just jump over a couple of things. I really
6 have to differ with counsel. She said don't worry about
7 the number of claims that were involved in the MST
8 agreement, those are being handled in 08-1. Those were
9 her words. I don't know what she is talking about.

10 We settled 08-1 as to the allocation of Chum. You may
11 recall -- We didn't get to trial on them, but you may
12 recall from the papers, originally there were five tribes
13 that fished in Central Puget Sound, now there is two, and
14 that led to difficulties in how to allocate the fish,
15 which was eventually done.

16 I thought 08-1 was dismissed. I would have to look at
17 the record on that. But there is certainly nothing going
18 on. I don't know what she is talking about being handled.
19 She mentioned all kinds of things, shrimp and so on, none
20 of which have anything to do with the MST agreement as I
21 can see it.

22 She constantly misstates the agreement. She read what
23 it said accurately on Page 2, and then misstated. She
24 said, and I quote, "The one purpose of the agreement was
25 to," quote, "protect current fisheries as they exist,"

1 unquote. That is not what it says.

2 The context of the agreement was all about Tulalip
3 fishing, where their U&A was, and could they fish in
4 Area 10. The agreement says on Page 2, quote, "This
5 settlement is intended to protect the existing fisheries
6 of the Muckleshoot and Suquamish Tribes in Central Puget
7 Sound," end quote. That is all anyone was talking about.
8 It didn't involve where did the Suquamish fish. There was
9 no question about that at the time, they fished in Central
10 Puget Sound.

11 The argument was how to allocate the fish if Tulalip
12 was to come in. And there were elaborate mechanisms
13 worked out to guarantee everyone got a fair share of their
14 home region of production, which was the fish that would
15 end up in their home regions, and to insure that the South
16 Sound tribes got the lion's share of that fishery, because
17 those fish were headed to that area.

18 There was no discussion, no mention and no intent in
19 the document to protect Suquamish fisheries generally.
20 Which even if there were, it wouldn't mean anything
21 because nobody assumed they were going to try to fish in
22 Possession Sound. They hadn't, they didn't, and they
23 didn't for decades after that agreement. It is only
24 recently that we have had these issues.

25 Thank you, your Honor.

1 THE COURT: Thank you, counsel. Mr. Jannetta, do
2 you want to make any final comments?

3 MR. JANNETTA: I do, your Honor. I would like to
4 start out by agreeing with something that counsel for
5 Suquamish said, if I remember it correctly. Counsel for
6 Suquamish said, this herring map, and the herring
7 regulations prior to Judge Boldt's ruling on the U&A,
8 indicated the area they thought was their U&A. I submit
9 that is true.

10 But what she didn't tell the court, and the court may
11 not remember, is that in this paragraph of the order on
12 motions for summary judgment in 05-3, this court noted
13 that after Judge Boldt's ruling on U&A, Suquamish amended
14 its regulations to delete those waters that are in dispute
15 in this case. You said it is not improper to use this
16 evidence as Suquamish's understanding of their own U&A at
17 that time.

18 Suquamish's understanding of its U&A after Judge Boldt
19 had made the ruling is consistent with Barbara Lane's
20 testimony, it is consistent with Judge Boldt's use of the
21 map, it is consistent with our position in 05-3, it is
22 consistent with the position of Mr. Morisset with regard
23 to 05-4. And for decades after that, until 2003, they
24 fished consistently with that understanding that you found
25 in 1975. And I believe that that fully justifies the use

1 of the term "incursion" with regard to these waters.

2 Now, I have a little bit of deja vu, because I think I
3 heard 05-3 being reargued before you here, and I want to
4 remind you that this is -- that that case is decided. I
5 want to remind you that evidence of portaging is not in
6 the case. I don't think I need to remind you that you
7 concentrate on what was before Judge Boldt at the time,
8 and no amount of reaching forward for evidence or
9 rearguing 05-3 is going to change what is there. There is
10 nothing there about Holmes Harbor, and there is nothing
11 there to suggest portaging or any other fanciful theory
12 that one might come up with now.

13 I submit that we are still entitled to our partial
14 summary judgment.

15 THE COURT: Thank you, Mr. Jannetta.

16 Ms. Hansen, anything that you finally would like to
17 say? It was kind of weird procedurally the way we did
18 this here. Is there anything else you would like to say
19 in response to what has been brought up? You don't have
20 to.

21 MS. HANSEN: I did put stars over comments, so I
22 did have two points. I think it is important that -- it
23 is what Mr. Morisset said, even Barbara Lane said all of
24 the areas -- that map that Mr. Morisset showed us with the
25 little markings on the west side, she said that has to do

1 with home territory. If you look at her report, she says
2 it has nothing to do with off-reservation. And it is
3 clear, she says, that Suquamish went off-reservation to go
4 fishing, and they were widespread in where they went. So
5 you can't use that map and those words to say that that is
6 the only place that Suquamish fished.

7 Also, the MST agreement was about Central Sound, but
8 it was also about all of these areas. If you have taken a
9 look, and I think you have, it talks about 8(a), it talks
10 about 9, it talks about all of these areas, and it talks
11 about who -- which tribe is going to be the primary
12 manager for it or issue the regulations for it. So it is
13 not just an agreement about allocation, or I think
14 Mr. Morisset used another word. It was allocation and
15 something else.

16 The fact is, it is a U&A dispute settlement agreement.
17 It is not just an allocation agreement.

18 I want to note that in 1990 Tulalip, and Mr. Morisset
19 was representing Tulalip at that time, made that same
20 argument when Swinomish tried to come forward and get an
21 injunction against Tulalip for some overfishing that it
22 was doing.

23 And there, Magistrate Weinberg didn't buy that
24 allocation agreement argument. And neither did Judge
25 Craig, who said, an agreement is an agreement. It is

1 clear. There is nothing in here -- it is -- He found it
2 to be a U&A dispute agreement. And he said there is
3 nothing that prevents Tulalip from -- excuses Tulalip from
4 not performing this agreement. And Judge Craig said --
5 Judge Boldt, a long time ago, early in the case, said a
6 deal is a deal.

7 Well, your Honor, a deal is a deal here, too. And we
8 hope that you find that the MST agreement is in fact an
9 agreement and a settlement of U&A claims that are
10 overlapping, and that this applies to any situation that
11 comes up between Tulalip and Suquamish. Thank you.

12 THE COURT: Thank you. Ms. Rasmussen, you wanted
13 to address the court on a different matter entirely?

14 MS. RASMUSSEN: Yes, your Honor, I did.

15 I did also want to respond to one thing that the
16 Tulalip said, which I don't think the court needs to reach
17 here, which is about this constrained waters being more
18 specific than open waters, and raising sort of this
19 eastern Strait of Juan de Fuca issue, which you know we
20 hold quite near and dear. Just to remind the court, of
21 course, travel had to be for the purpose of fishing, not
22 for trading, that this court does not need to reach the
23 question of whether the Suquamish traveled or whether they
24 had U&A all the way up.

25 In addition, with respect to the Strait of

1 Juan de Fuca, the Ninth Circuit has held that it is a
2 geographical marker which Judge Boldt used with the
3 Clallam's U&A determinations specifically. In addition,
4 the Clallam had village sites all the way along the coast
5 of Juan de Fuca, which nobody else had.

6 So I just wanted to make sure that we don't sort of
7 divert -- We are all kind of pushing each other in
8 different directions. Don't send them our way so that we
9 have to jump in again on that, or at least save that one
10 issue for yet another day.

11 With respect to the second issue, which has nothing to
12 do with the sub-proceeding, counsel over the last couple
13 of years has been having different responses from the
14 Ninth Circuit with respect to how to participate in
15 appeals.

16 So it used to be with paper filing all the parties,
17 the gigantic service list, would receive copies of the
18 appeal documents, that we would all be able to respond to
19 those documents as either, you know, respondents or --
20 But we were all treated as parties. And then, of course,
21 electronic filing came and they created categories for
22 your participation, so you are either a respondent or an
23 appellant or an amici.

24 And the Ninth Circuit has sort of been flip-flopping
25 in terms of how to treat us. In some proceedings --

1 several years ago, for example, my client was told that
2 they had filed an answer in the case, they had filed
3 responses to summary judgment motions similar to here, and
4 the Ninth Circuit suddenly said, just as we were filing,
5 no, I'm sorry, you have to file an amicus brief or you
6 have to intervene, you can't file a response.

7 THE COURT: Who told you that? Was it the clerk
8 of the --

9 MS. RASMUSSEN: It was various clerks. We get
10 like the clerk of the day. And so I did that. And then
11 the next clerk came along and said, no, no, no, here is
12 your green brief back, I want a red brief, you are a
13 respondent. So that happened to us. And then we said,
14 okay, fine, that's great, because we felt like we were
15 respondents from the get-go.

16 And we were working with Kathy also on the local Ninth
17 Circuit issue, because she always has problems with the
18 docket and who is the parties. And then it happened
19 again. And I said, well, you know, last time I did this I
20 had to file a green brief, and then I was told to file a
21 red brief, and now of course everything is just a white
22 brief and we file electronically, and this is somewhat
23 inconsistent. And they said, I'm sorry, you are not a
24 party, and you have to file a motion to intervene.

25 And so I have consulted with counsel and I think been

1 involuntarily nominated with Joe Panesko to try to raise
2 this issue with this court and try to come up with some
3 sort of solution for how we are treated on appeal.

4 Of course, we have the Lummi case on appeal. There is
5 parties that want to know, you know, are they going to
6 have to appear as amici, sort of follow this motion to
7 intervene procedure, which is the latest from them, is
8 that we have to intervene, and then they will allow us to
9 be added as a party. And then once we are a party, they
10 don't know what to call us, because it isn't a respondent
11 or an appellant.

12 And so they proposed to me at one time that we could
13 create another category of participants called interested
14 parties, which this court has, where you can participate,
15 you know, I am partially on this person's side and
16 partially on this person's side, but that we had to follow
17 some sort of procedure, and it would be difficult.

18 And so Mr. Panesko and I think it would be helpful to
19 have the court help us in creating this category of
20 interested parties, because we don't believe, correctly,
21 that we should have to intervene in a case where we are
22 all bound by the decision, and that we have participated
23 in the lower court pleadings, and should be considered
24 parties.

25 THE COURT: Ms. Rasmussen, thank you for bringing

1 that to my attention. I know that when we switched over
2 to electronic filing it would create those kinds of
3 issues, especially in a case like this. And you know that
4 I love to tell the Ninth Circuit what to do, but -- While
5 I may have developed a reputation for having tried that in
6 the past, I think they pretty much tell me what my place
7 is.

8 I think if all the parties agree -- If you can come
9 up maybe with sort of a specific plan, I like this
10 creating a new category, then I will do whatever I can to
11 work with the clerk of the Ninth Circuit to make sure that
12 it is put into their system so that any new clerks coming
13 on for any of the new appellate judges recognize that this
14 is a different sort of case, and that there is this
15 category of interested parties that may be partially here,
16 partially there.

17 MS. RASMUSSEN: I would appreciate that, your
18 Honor, and any guidance you can give us on how we should
19 get that in front of the Ninth Circuit. That is what
20 Mr. Panesko and I have been struggling with. That's why I
21 am addressing it here. We didn't just want to call your
22 Honor. We didn't know if we should write a letter and
23 file it, and thereby you could respond and we could send
24 that all up to the Ninth Circuit. We just weren't sure
25 how to get the right people involved.

1 THE COURT: Let me ask you to do this: In the
2 form of a letter would be fine, something to me in
3 writing, that I could then pass on at the circuit level.
4 What I will do is, I will follow up with the clerk of the
5 Ninth Circuit. Every now and then they need people to
6 help, and I volunteer, as many other district judges do,
7 to sit up there by designation. What I will do is, I will
8 follow up informally and see what it is they need, either
9 from me or from the parties in this case, to create that
10 kind of category. But what I would like from all of you
11 is to have something where all of you agree. And it would
12 give more strength to what I am requesting of them if they
13 understand that this is sort of a unique case.

14 MS. RASMUSSEN: Thank you, your Honor.

15 THE COURT: All right. Counsel, my standard
16 practice is to go back, take a look at your moving
17 documents again in view of the oral arguments that were
18 made. I thank all of you for your presence.

19 Let me also read from the MST the stipulation that was
20 handled by Special Master Robert Cooper when the
21 Muckleshoot, Suquamish and Tulalip Tribes came to an
22 agreement. I like this language. It says, "In an effort
23 to foster closer ties between the parties, promote tribal
24 unity and cooperation, and to support the development of a
25 comprehensive management plan, the Tulalip, Suquamish,

1 Muckleshoot tribes have agreed as set out in this
2 settlement agreement."

I said this during the culvert case as well, there are some cases that just don't lend themselves very well to judicial disposition. This case, unfortunately, is one of those. And I remind all of you that it is always so much better to cooperate amongst yourselves in terms of reaching agreements that are beneficial to all.

I also understand that we are talking about limited resources, and they may be getting more limited as time goes on, and that creates these kind of issues. It is always better if you decide for yourselves than leaving it in my hands. I will do the best that I can.

14 | Thank you all. We will be at recess.

15 | (Adjourned.)

CERTIFICATE

I, Barry L. Fanning, Official Court Reporter, do hereby certify that the foregoing transcript is true and correct.

S/Barry L. Fanning

Barry L. Fanning